NO. 20,762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JOSEPH T. STRONG d/b/a
STRONG ROOFING & INSULATING CO.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

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RESPONDENT'S BRIEF

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Subject Index

Table of Authorities Cited

Statutes

Texts

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Preliminary Statement

This is a proceeding, pursuant to Section 10 (e) of the National Labor Relations Act, as amended, in which the National Labor Relations Board is seeking to enforce its order (R 18-19, 31)* against Joseph Strong d/b/a

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* References designated "R" are to volume 1 of the record herein. References designated "Tr" are to the reporter's transcript of the testimony as reproduced in volume 2 of the record. References designated "GC Exch.," "R. Exh.," or "TX Exh." are to exhibits of the General Counsel, Respondent, and Trial Examiner, respectively.

Strong Roofing and Insulating Company (referred to herein as "Respondent"), issued on April 22, 1965, and reported at 152 NLRB No. 2. The proceedings before the Board were initiated by the filing of an unfair labor practice charge with the Board on June 3, 1964, by Roofer's Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (referred to herein as the "Union"). (R 3, 12, 13) In the proceedings before the Board Respondent contended that the complaint was barred by Section 10 (b) of the Act in view of the fact that the charge was filed more than six months after Respondent had advised the Union of its refusal to sign a multi-employer contract, and that if the Board did determine the merits of the complaint, it should find that the Union, by its conduct during the period in question, had waived any right it may have had to require Respondent to sign the multi-employer contract (R 13, 17). The Board adopted without opinion the conclusions of its Trial Examiner that the proceedings was not barred by Section 10 (b) and that by refusing to sign the multi-employer contract, Respondent had violated Sections 8 (a) (1) and 8 (a) (5) of the Act.

Respondent is submitting the following statement of facts which includes certain facts found by the Trial Examiner and adopted by the Board or uncontradicted in the record which were not included in the statement of facts in the Board's brief.

Statement of Facts

Respondent with the assistance of his wife operated a small roofing contracting business in Alhambra, Cali-

fornia (Tr 59, 84; GC Exh. 5a). From 1949 to August 1963, Respondent employed members of the Union and said employees were covered by multi-employer contracts between the Union and the Roofing Contractors Association of Southern California (referred to herein as the "Association"), of which Respondent was a member (Tr 61).

Negotiations for the most recent contract commenced in March, 1963, and terminated on August 14, 1963 (Tr 16). Respondent's only knowledge of the negotiations was through bulletins received from the Association (Tr 68-69). In view of the small local nature of his business and the number of non-union competitors, Respondent decided to withdraw from the multi-employer unit (Tr 52). On August 20, 1963, he wrote the following letter to the Joint Labor Relations Board:

> "Persuant [sic] of that Artle [sic] in the Master Agreement dated August 15, 1963; to and including August 15, 1967; pertaining to the termination of the Master Contract, I, J. T. Strong d.b.a. as the Strong Roofing & Insulation Company, located at 710 South Garfield Avenue, Alhambra; request action in accordance with the above noted Article the current Master agreement. [sic].
>
> "Date of termination to be set at next regular meeting of the J.L.R.B., who shall release depost [sic] of $400.00 held as guarantee of faithful performance regarding labor payments as so described in Master Agreement." (R 15)

The Joint Labor Relations Board is composed equally of Union and employer representatives and was established to administer the collective bargaining agreement. (R 15; Tr 21) In view of the fact that no issue was raised to the contrary, the Trial Examiner found that this letter was sent to the proper party. (R 15) The Union and employer representatives on the Joint Labor Relations Board referred the matter to the executive secretary of the Association who granted the requests set forth in the letter of August 20, 1963, by changing Strong's status from a regular to an associate (non-union) member of the Association and by returning the $400.00 deposit held as a guarantee of the payments required by the contract between the Union and the Association. (Tr 23, 24, 70-72)

During the period between August 14, 1963, when the terms of the contract were agreed upon and June 3, 1964, when the instant charge was filed, the Union communicated with Respondent with respect to the contract on only three occasions. (Tr 51, 52, 72-75, 90-93) Mr. Sheridan, the Union representative assigned to the geographical district in which Respondent's business is located (Tr 43), visited Respondent's office on October 18 or October 20, 1963, and talked to Respondent's wife, requesting that Respondent sign the new contract. (Tr 90-91) Respondent's wife advised Mr. Sheridan that Respondent had indicated that for economic reasons he could not execute the contract. Sheridan, instead of advising Mrs. Strong that Respondent was required to execute the agreement, stated, "I hate to see you drop out," and Mrs. Strong replied, "We hate to drop out." (Tr 91)

Sheridan returned on approximately December 10, 1963, and stated that if Respondent did not sign the contract he would have to pull the Union men off the job. Respondent's wife advised him that the Union men were leaving to start their own business and that her husband was unable to execute and operate under the Union contract. Sheridan again did not contend that the Union considered Respondent bound by the agreement, but remained to join Mrs. Strong and others in the office for coffee, giving Respondent no grounds for believing that the Union was challenging his withdrawal from the multi-employer unit. (Tr 92-93)

Subsequent to the second conversation between Sheridan and Mrs. Strong, there was no further communication between the Union and Respondent until April, 1964, when a representative of a union representing employees at a plant where Respondent was repairing certain portions of the roof advised Respondent of a possible picket line because Respondent was non-union. (Tr p. 74) Respondent referred the representative of plant union to the Union and subsequently Union representative Nuttall visited Respondent's office and Respondent explained the reasons why Respondent could not sign the contract. (Tr p. 52, 72-73) At no time during this conversation did Mr. Nuttall state that the Union was taking the position that Respondent was legally required to sign the contract. (Tr p. 73)

Respondent received no further communication from the Union until the instant unfair labor practice charge was filed with the Board on June 3, 1964.

Questions Presented

Question No. 1: Was the Board precluded by Section 10 (b) of the Act from issuing and determining the complaint herein in view of the fact that the underlying unfair labor practice charge was filed more than six months following Respondent's refusal to execute the multi-employer contract?

Question No. 2: Was the Union estopped by its conduct during the period August, 1963, to June 3, 1964, from contending that it did not consent to the Respondent's withdrawal from the multi-employer unit and release from the obligations of the multi-employer contract?

Question No. 3: Did the Board err in including in its order a requirement that Respondent pay to the appropriate source any fringe benefits provided for in the multi-employer contract?

Summary of Argument

Respondent's argument will be directed to each of the three issues set forth in Questions Presented.

First, the underlying unfair labor practice charge was barred by Section 10 (b) of the Act. An agreement was reached on the multi-employer contract on August 14, 1963. On October 18, or 20, 1963, Respondent unequivocally advised the Union of his refusal to sign the agreement. At this point Respondent's unfair labor practice was complete and the charge should have been filed no later than six months following said unequivocal refusal to sign the contract. Court and Board decisions support

this position of Respondent. Cases cited by the Board pertain to instances where a separate unfair labor practice occurred during the six month limitation period rather than the reaffirmation of the previous unfair labor practice barred by Section 10(b). The effect of the Board's argument is to permit the limitation period to run indefinitely, a result which has never been permitted by the courts. Finally, Section 10(b) was intended to operate as a general statute of limitations and applying principles applicable to such statutes, the Court should find that the limitation period expired prior to the filing of the charge.

Second, although Respondent's attempted withdrawal from the multi-employer unit by his letter dated August 20, 1963, may have been untimely, the following course of conduct pursued by the Union subsequent to receipt of said letter requires the conclusion that Respondent was justified in believing that the Union had consented to the withdrawal from the unit and release from the obligations of the contract: the absence of a negative response to Respondent's letter of August 20, 1963; the return of the deposit guaranteeing Respondent's performance of the obligations of the multi-employer contract; the statements of Union representatives in the three meetings between the Union and Respondent or his wife during the period in question; and the unexplained failure of the Union to promptly enforce payment of fringe benefits required by the contract.

Third, the portion of the order requiring Respondent to pay fringe benefits was an abuse of the Board's discretion because: this remedy was not requested by the Gen-

eral Counsel at the hearing; there is no showing Respondent's non-union employees were adversely affected; the Union's conduct was dilatory and lethargic; and the remedy was punitive since there is no showing that Respondent would have been awarded particular jobs if his bid was based on the fringe benefit payments required by the contract.

ARGUMENT

I. THE BOARD WAS BARRED BY SECTION 10(b) FROM ISSUING AND DETERMINING THE COMPLAINT HEREIN BECAUSE THE UNDERLYING CHARGE WAS FILED MORE THAN SIX MONTHS FOLLOWING RESPONDENT'S INITIAL REFUSAL TO SIGN THE MULTI-EMPLOYER CONTRACT.

By including the following proviso in Section 10(b) of the Act, Congress conditioned the use of the Board's facilities and reliance upon rights granted by the Act upon the prompt and diligent exercise of such rights:

> "Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ."

The unfair labor practice found by the Board to have been committed by Respondent was the violation of Sections 8(a)(1) and 8(a)(5) by refusing to sign the multi-employer contract. In order to establish such a violation the Board must show three essential elements: a duty to sign; a demand; and a refusal. In the instant case the duty to sign was based solely on the claim that Respondent was still a member of the Association on August 14, 1963, when the four year contract, effective August 15, 1963 was agreed upon between the Association and the Union. On October 18, 1963, the Union demanded that Respondent execute the contract and Respondent refused said demand. At this point all three essential elements of the unfair labor practice — the duty to bargain, the de-

mand, and the refusal — were present and the unfair labor practice was complete. Since the underlying charge, on which the complaint in this case was issued, was not filed until June 3, 1964, more than six months later, the complaint was barred by Section 10(b). *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB (Bryan Manufacturing Company,* 362 U.S. 411 (1960); *Gulfcoast Transit Company v. NLRB,* 322 F.2d 28 (CA 5, 1964); *NLRB v. Brown,* 310 F.2d 539 (CA 9, 1962); *American Federation of Grain Millers, AFL v. NLRB,* 197 F.2d 451 (CA 5, 1952); *NLRB v. Pennwoven, Inc.,* 194 F.2d 521 (CA 3, 1952); *Marcus Trucking Company,* 126 NLRB 1080, 1092-1093 (1960); *Knickerbocker Manufacturing Company,* 109 NLRB 1195 (1954); *Bonwit Teller, Inc.,* 96 NLRB 608 (1951); *Greenville Cotton Oil Company,* 92 NLRB 1033 (1950).

The Board argues that the refusal to sign the contract in April, 1964, constituted a separate unfair labor practice and consequently the charge filed on June 3, 1964, was not barred by Section 10(b). (Board brief, pp. 14-15) Although there are no court or Board decisions interpreting Section 10(b) as applied to a refusal to sign a multi-employer contract, an analysis of the applicable court and Board decisions requires a conclusion that the charge in the instant case was barred by Section 10(b).

In *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB (Bryan Manufacturing Company),* 362 U.S. 411 (1960), the Supreme Court rejected a Board contention that an unfair labor practice which had commenced more than six months

prior to the filing of a charge could still be the subject of a complaint since it was continuing within the six month period. In that case the Board held that the enforcement of an otherwise valid collective bargaining agreement between an employer and a union violated the Act because the agreement was executed at a time when the union did not represent a majority of the employees in the unit. In its argument to the court the Board conceded that the execution of the unlawful minority agreement was barred by Section 10(b) but contended that its complaint was based upon the parties' continued enforcement of the agreement within the limitation period. The court analyzed the purpose and effect of Section 10(b) and concluded that:

> ". . . the entire foundation of the unfair labor practice charge was the union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact, enforcement of this otherwise valid union security clause was wholly benign."
> (362 U.S. at 417)

In the instant case the entire foundation of the unfair labor practice charge is the refusal to sign the contract. This refusal was communicated to the Union no later than October 18 or 20, 1963, and the six month period of limitation should be deemed to have commenced at that point. The refusal to sign in April, 1964, was entirely lawful without reference to the events occurring outside the six month period.

NLRB v. Pennwoven, Inc., 194 F.2d 521 (CA 3, 1952), also requires the conclusion that the complaint

herein is barred by Section 10(b). Recognizing that the employer had unlawfully discriminated against three employees in refusing to hire them following a strike, the court in *Pennwoven* held that the complaint was barred by Section 10(b) because the initial refusal to hire occurred nine months prior to the filing of the charge *even though the employer reaffirmed its position by refusing reinstatement requests shortly prior to the filing of the charge.* As in the instant case the Board argued that since the unlawful refusal was repeated within the six month period, the violation should be regarded as a continuing one and Section 10(b) should not be construed as barring the issuance of the complaint. The court rejected this argument because the basic unfair labor practice was the initial refusal to rehire and the subsequent refusal was merely a reaffirmation of the allegedly unlawful position previously taken. Similarly, in the instant case the refusal to sign the contract in April, 1964, was merely a reaffirmation of the position communicated to the Union in October, 1963.

The reasoning of the *Local Lodge 1424, International Association of Machinists* and *Pennwoven* cases was accepted by this Court in *NLRB v. Brown,* 310 F.2d 539 (CA 9, 1962), in rejecting the Board's contention that the continuance in existence of an allegedly unlawfully dominated company union was a proper basis for a complaint even though the unlawful domination of the company union occurred more than six months prior to the filing of the charge. See also *Gulfcoast Transit Company v. NLRB,* 332 F.2d 28 (CA 5, 1964).

Other decisions supporting Respondent's position that the six month limitation period in Section 10(b) commenced to run at the time of the *initial* refusal to sign are: *Marcus Trucking Company, Inc.*, 126 NLRB 1080, 1092 (1960), and *Goodall Company*, 86 NLRB 814, 844 (1949) (Board held that charges alleging the invalidity of a new salary plan and a wage increase, respectively, were barred *since the initiation of the plan and increase occurred more than six months prior to the filing of the charge* even though said plan and increase were still in effect during the six month period) and *Bonwit Teller, Inc.*, 96 NLRB 608, 610 (1951), enf. denied on other grounds, 197 F.2d 640 (CA 2, 1952), cert. denied, 345 U.S. 905 (1953) (Board held that a charge directed against an unlawful policy of withholding individual wage reviews and increases during a union organizing drive was barred by Section 10(b) *where the policy was initiated prior to the six month period* even though the policy was continued in effect during the six month period).

In support of its position that Respondent's violation was of a continuing nature which extended into the six month period, the Board cited *NLRB v. White Construction and Engineering Co., Inc.*, 204 F.2d 950 (CA 5, 1953), and *NLRB v. Local 269, International Brotherhood of Electrical Workers, AFL-CIO*, 357 F.2d 51 (CA 3, 1966). Both of these cases are distinguishable on their facts from the instant case. In *White Construction and Engineering Co., Inc.*, cited on page 14 of the Board's brief, the union was certified as bargaining representative of the employer's employees in December and the employer immediately refused to bargain. The charge

was not filed until the following July but the court concluded that because of the certification the duty to bargain extended for a reasonable period of time.* Since the employer had repeatedly refused the union's demands to bargain made subsequent to December and within the six month period while the duty to bargain under the certification was still in force, the court concluded that the complaint was not barred by Section 10(b) of the Act.

The duty to bargain which arises from a certification must by its nature be regarded as a continuing duty which extends for a period of time. The rationale behind extending such a duty is that since the employees have selected the union as their collective bargaining representative, the union is entitled to a period of time in which to establish a bargaining relationship during which time the employer cannot arbitrarily refuse to bargain. There is no such rationale, however, for construing the duty to sign a multi-employer contract as being a continuing duty. The duty to sign a multi-employer contract is a fixed obligation the breach of which should immediately commence the six months limitation period to run, just as the execution of an otherwise lawful minority contract or the initial discriminatory refusal to rehire have been found to commence the six month period to run. *Local Lodge 1424, International Association of Machinists v. NLRB,* supra; *NLRB v. Pennwoven, Inc.,* supra.

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* The Supreme Court subsequently sustained the Board's rule that a union's majority status could not be challenged for one year following certification. *Ray Brooks v. NLRB,* 348 U.S. 96 (1954).

NLRB v. Local 269, International Brotherhood of Electrical Workers, AFL-CIO, supra, cited on page 15 of the Board's brief, also involved a current violation during the six month period. In that case an illegal hiring clause had been executed prior to the six month period but during the six month period the illegal clause had been applied in a discriminatory manner as distinguished from the *Local Lodge 1424, International Association of Machinists* case where the unlawful executed contract was validly applied during the six month period. In the instant case the refusal in April, 1964, to sign the contract should be considered as a reaffirmation of the earlier refusal and not as an independent violation as the discriminatory application of the hiring clause was found to be in the *Local 269, International Brotherhood of Electrical Workers, AFL-CIO* case.

Moreover, the effect of the Board's argument is to entirely remove the protection of the limitation period in Section 10(b) from a refusal to sign a multi-employer contract under circumstances similar to those in the instant case. Under the Board's argument, the Union could at any time during the term of the four year contract or even subsequent thereto demand that Respondent sign the 1963-1967 contract and the refusal to sign would constitute a separate unfair labor practice. Congress obviously did not intend to permit Section 10(b) to be so easily circumvented by making subsequent demands. The Board's argument is comparable to its argument in *Local Lodge 1424, International Association of Machinists, AFL-CIO v. NLRB (Bryan Manufactur-*

ing Company), supra, where the Supreme Court observed that:

> "It is apparently not disputed that the Board's position would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here. For, once the principle on which the decision below rests is accepted, so long as the contract — or any renewal thereof — is still in effect, the six-month period does not even begin to run."
> (362 U.S. at 425)

On the other hand, applying the Board's argument to the two cases cited in its brief, *NLRB v. White Construction and Engineering Co., Inc.*, supra, cited on page 14 of the Board's brief, and *NLRB v. Local 269, International Brotherhood of Electrical Workers,* supra, cited on page 15 of the Board's brief, the six month period would ultimately commence to run in those cases without being subject to renewal by subsequent demands. In the *White Construction and Engineering Co., Inc.* case, when a reasonable period of time following certification had elapsed the six month period would commence to run and, once it had commenced the employer's liability could not be renewed by a further demand to bargain. Similarly, in the *Local 269, International Brotherhood of Electrical Workers* case, the sixth month period would commence to run as soon as the union ceased its unlawful hiring practices and the union's liability could not be renewed by a further demand.

Finally, as observed by Chief Judge Biggs in his concurring opinion in the *Pennwoven* case, supra, 194 F.2d

521, 526, Section 10(b) "is phrased like the typical statute of limitations and was obviously intended by Congress to operate as such." Whether Respondent's refusal to sign the multi-employer contract be regarded as constituting a tort or a breach of contract, it is well established that the statute of limitations commences at the time the contract was initially repudiated or the tort initially committed. 34 Am. Jur. Limitation of Actions §137, pp. 110-111; §160, pp. 126-127 (1941).

On the basis of the foregoing authorities and arguments, this Court should find that the issuance of the complaint herein was barred by Section 10(b) and that enforcement of the Board's order must therefore be denied.

II. THE UNION WAS ESTOPPED BY ITS CONDUCT DURING THE PERIOD AUGUST 20, 1963, TO JUNE 3, 1964, FROM CONTENDING THAT IT DID NOT CONSENT TO RESPONDENT'S WITHDRAWAL FROM THE MULTI-EMPLOYER UNIT AND RELEASE FROM THE OBLIGATIONS OF THE MULTI-EMPLOYER CONTRACT.

Respondent's basic contention with respect to the merits of the charge that he violated Sections 8(a) (1) and 8(a) (5) of the Act by refusing to sign the multi-employer contract is that the Union, by its conduct between the receipt of Respondent's letter of August 20, 1963, to the Joint Labor Relations Board and the filing of the charge on June 3, 1964, consented to Respondent's withdrawal from the multi-employer unit and release from

the obligations of the multi-employer contract. As the Board has recognized on page 12 of its brief, an employer's withdrawal from a multi-employer unit is effective if the union consents to the employer's withdrawal even where such withdrawal would have been untimely. *C & M Construction Co.*, 147 NLRB 843, 845-846 (1964); *Metke Ford Motors, Inc.*, 137 NLRB 950 (1962).

An evaluation of the record in the instant case can lead to no other conclusion than that Respondent was justified in believing that the Union was consenting to his withdrawal. First, substantial significance must be accorded to Respondent's letter of August 20, 1963, in which he notified the Joint Labor Relations Board of his desire to terminate the new contract and requested return of the deposit posted to insure compliance with the contract. Although this letter was sent to the Joint Labor Relations Board rather than the Union, the Joint Labor Relations Board consisted of an equal number of representatives of both the Association and the Union and the Trial Examiner's finding that the letter was sent to the proper party was adopted by the Board. (R 15, 31) The Union not only did not immediately respond to the letter of August 20, 1963, by advising Respondent that the Union would consider him legally obligated by the 1963 contract and refusing his request to withdraw from the unit and have the deposit returned but made no response at all and delegated the matter to the executive secretary of the Association who returned Respondent's deposit and changed his membership status in the Association. (Tr 23, 24).

Neither the Trial Examiner nor the Board attached the proper significance to the return of the deposit. The Trial Examiner concluded that the deposit was returned too late to constitute consent. (R 17) However, as conceded by the Board on page 12 of its brief, an employer can withdraw at any time from a multi-employer unit with the consent of the Union and the other employers in the unit. Moreover, the return of the deposit occurred at a critical point following Respondent's unequivocal communication to the Union that he would not sign the new contract. The return of the deposit compounded by the Union's failure to advise Respondent of his position that it considered him bound by the contract could only be regarded by a reasonable man in Respondent's position as indicating consent of the Union to Respondent's withdrawal from the unit and release from the obligations of the contract. Although the Board in a footnote on page 13 of its brief contends that the record does not show that the Union acquiesced in the return of the deposit by the Association, this argument ignores the fact that the Union members on the Joint Labor Relations Board, which was found by the Trial Examiner to constitute the proper party to receive Respondent's letter of withdrawal, delegated action on the letter and deposit to Mr. Baier, then the executive director of the Association. Under these circumstances both the Union and the Association were bound by Mr. Baier's action in returning the deposit.

The Union's response to Respondent's letter of August 20, 1963, is in direct contrast to the response of the union in *Spun-Jee Corp.*, 152 NLRB No. 96, 59 LRRM 1206 (1965), where the union, upon receiving a letter from

the employer to the effect that the employer was withdrawing from the multi-employer unit, immediately replied that the union would take the position that the employer could not withdraw from the multi-employer unit and was bound by the multi-employer contract.

In addition to the Union's failure to object to Respondent's letter of August 20, 1963, and its failure to advise the Association not to return the deposit as requested by Respondent the only meetings between Respondent and the Union are devoid of any statement or other indication by the Union that it considered the Respondent to be bound by the multi-employer contract. In the first meeting between Union representative Sheridan and Mrs. Strong on October 18, Sheridan's response to Mrs. Strong's statement that Respondent was withdrawing from the multi-employer unit was "I hate to see you drop out," and Mrs. Strong replied that "They hated to drop out." On the basis of this exchange the Union had been clearly advised of Respondent's intention not to sign the contract. The response "I hate to see you drop out" must be regarded under these circumstances as indicating a reluctant agreement on the part of the Union to Respondent's withdrawal from the multi-employer contract.

In the second meeting in December, 1963, Sheridan again requested that Respondent sign the contract but when advised that Respondent was still retaining its earlier position, Sheridan made no objection and joined Mrs. Strong and others for coffee.

During their meeting in April, 1964, Union representative Nuttall gave Respondent no reason to believe

that the Union was considering him bound by the multi-employer contract. Nuttall, who was assigned to the geographical district where Respondent was repairing a roof and was not the Union representative assigned responsibility for Respondent's operation, requested that Respondent sign the contract in a manner similar to that in which a request was made by a Union representative in 1949 when Respondent was first asked to sign the multi-employer contract. (Tr 60-61) Respondent could reasonably conclude from this conversation that Nuttall was simply attempting to induce a non-union contractor to sign the contract.

The mere fact that Respondent had been president of the Association several years previously is not a sufficient basis for an inference that he was, therefore, familiar with rules regarding the legal effect of the multi-employer contract and withdrawal from the multi-employer bargaining unit. The Constitution and By-laws of the Association demonstrate that there are many other purposes and functions of the Association which are not related to labor relations. (GC Exh 2, Articles II, X) The labor relations and negotiations were conducted by a separate labor committee and there is no showing that Respondent was a member of such separate committee or that he was familiar in any way with labor relations matters. Indeed, the language in Respondent's letter of August 20, 1963, and his explanation to the Trial Examiner as to his understanding of the effect of the termination clause in the contract demonstrates conclusively that Respondent had little, if any, understanding of basic labor relations concepts and in particular rules governing

interpretation of collective bargaining contracts and the withdrawal of employers from a multi-employer unit. (Tr 68-70)

Finally, the failure of the Union to require that Respondent pay fringe benefits is further evidence that the Union did not consider Strong bound by the contract. On at least two occasions the Union had acted swiftly when Respondent failed to pay fringe benefits as required. (Tr 75-76, 78, 89) In contrast, in the instant case the Union took no action at all and thus gave Respondent further grounds for believing that he had been relieved from the obligations of the contract.

In determining that the Union did not consent to Respondent's withdrawal and release from the obligations of the contract, the Board evaluated the totality of the Union's conduct in a mechanical and unrealistic manner. Viewing all these facts as a whole: the absence of a negative response to the letter of August 20, 1963, and the return of the deposit; the equivocal statements by Sheridan in his two meetings with Mrs. Strong; the failure of Nuttall to set forth the Company's position in his meeting held pursuant to Strong's invitation and the unexplained change in the Union's strictly enforced policy of promptly requiring payment of fringe benefits, a reasonable man in respondent's position, unversed in the technicalities of labor relations law, could only conclude that the Union was releasing him from the obligations of the multi-employer contract.

Accordingly, on the basis of the foregoing, this Court should conclude that even if the underlying charge was

not barred by Section 10(b), the complaint should have been dismissed by the Board on the ground that the Union by its conduct waived any right it may have had to require Respondent to sign the contract.

III. THE BOARD ERRED IN INCLUDING IN ITS ORDER A REQUIREMENT THAT RESPONDENT PAY TO THE APPROPRIATE SOURCE ANY FRINGE BENEFITS PROVIDED FOR IN THE MULTI-EMPLOYER CONTRACT.

The traditional remedy which the Board has applied in cases where it has found that an employer violated Sections 8(a) (1) and 8(a) (5) of the Act in refusing to sign a multi-employer contract has been to direct the employer to sign the contract. *Universal Insulation Corporation,* 149 NLRB 262 (1964) enf'd. 361 F.2d 406 (C.A. 6, 1966); *Sheridan Creations, Inc.,* 148 NLRB 1503 (1964) enf'd. 357 F.2d 245 (C.A. 2, 1966;) *Anderson Lithograph Company, Inc.,* 124 NLRB 920 (1959) enf'd. sub nom *NLRB v. Jeffries Banknote Co.,* 281 F.2d 893 (C.A. 9, 1960).

In *Gene Hyde d/b/a Hyde's Supermarkets,* 145 NLRB 1252 (1964) enf'd. 339 F.2d 568 (C.A. 9, 1965), the Trial Examiner, in addition to directing the employer to sign the agreement, included a requirement that the employer honor the agreement and comply with the provisions thereof. The Board deleted the direction to "comply with the provisions of the collective bargaining agreement" on the ground that the enforcement of the terms of a collective bargaining agreement is for the courts rather than the Board but did include in its order the

direction that the employer "honor" the agreement and this order was enforced by this Court.

Following the *Hyde* case, the Board, in certain cases, has commenced to direct employers to give retroactive effect to collective bargaining contracts. In one of the first cases in which this remedy was directed, *Ogle Protection Service, Inc.,* 149 NLRB 545 (1964), the Trial Examiner had refused the General Counsel's request that the contract be performed retroactively and employees receive back pay. The Board found merit in the General Counsel's exception to the Trial Examiner's failure to direct retroactive application of the contract and amended the order requiring that retroactive effect be given to the contract.

It is submitted that enforcement of collective bargaining contracts should be reserved for the courts rather than the Board. In any event, the record in this case demonstrates that regardless as to whether such a remedy might be appropriate in other cases, the direction of such a remedy against Respondent was an abuse of the Board's discretion.

First, in this case the General Counsel did not as he did in *Ogle Protection Service, Inc.,* supra, request an affirmative remedy such as the payment of fringe benefits. Therefore, until the issuance of the Trial Examiner's decision the Respondent had no indication that the question of an issuance of an affirmative remedy was an issue in this case. As a matter of basic due process, the Respondent should have been advised of the Board's intention to request such remedy so that it could have

been in a position to submit evidence showing the inappropriateness of such a remedy.

Second, this is not a situation as in *Ogle* where an employer is reneging on an agreement to grant certain wage increases and fringe benefits to his employees. In the instant case, although the record was not fully developed on this issue in view of the General Counsel's failure to request the affirmative remedy, it is apparent that Respondent hired new employees and presumably advised them of their specific terms and conditions of employment so that before the employees were placed on the active payroll they were aware of the fact that the terms and conditions of their employment would not be based upon the multi-employer contract. (Tr 69, 92) The employees themselves, therefore, are not affected by the remedy since they were employed with the understanding that the multi-employer contract would not be applicable. With respect to the status of the Union it is apparent that the Union's conduct in this case was exceptionally dilatory and lethargic and there is no evidence in the record which would indicate that the Board should exercise its remedial powers to require payment of funds to the Union. The Union on and after October 18 or 20, 1963, could have taken steps, as it had in the past, to insure payment of the fringe benefits and compliance with the union security provision and the other provisions in the multi-employer contract. (Tr 75-76, 78, 89)

Moreover, the remedy is punitive rather than remedial in nature as there is no basis in the record for inferring that Respondent could have obtained any or all of the

jobs on which his employees worked subsequent to the date Respondent ceased payment of fringe benefits. If Respondent has based his bids on the fringe benefit payments specified in the contract, he might not have received the jobs. Consequently, under the Board's order Respondent is being required to make payments which in fact he may not have had to make if he had signed and complied with the contract.

It should also be noted that the Board issued an affirmative remedy requiring the payment of fringe benefits beyond the six month period immediately prior to the filing of the charge. Presumably under the Board's theory in this case it could at any time have issued a complaint on the basis of a further demand within six months of the filing of the charge and ordered the payment of fringe benefits to be retroactive for the entire contract. Such a position is not only proscribed by Section 10(b) but is patently unfair and unjust.

It is therefore submitted that in the event this Court does find that Respondent did violate Sections 8(a)(1) and 8(a)(5) of the Act by refusing to sign a multi-employer contract enforcement of that portion of the Board's remedy requiring payment of fringe benefits to appropriate sources should be denied.

Conclusion

On the basis of the foregoing, enforcement of the Board's order against Respondent should be denied.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALFRED C. PHILLIPS